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7
8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF WASHINGTON**

10 UNITED STATES OF AMERICA

11 Plaintiff,

12 vs.

13 JORDAN EVERETT STEVENS,

14 Defendant(s).
15

) Case No. 19-CR-2038-SAB

) MOTION FOR NEW TRIAL

) With oral argument 12-1-2021 3:00 P.M.
Yakima

16
17 **MOTION**

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19 COMES NOW the defendant, Jordan Everett Stevens, through counsel, and
20 moves this court, pursuant to FRCP 33(b)(1) for a new trial. This motion is based
21 upon the declarations regarding new evidence filed herewith and the memorandum
22 set forth below. A hearing date of December 1, 2021 is suggested. Ms. Kane, of
23 counsel for Mr. Stevens, will be making the defense argument.
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MEMORANDUM

Statement of facts

Jordan Stevens was convicted June 10, 2021 of First Degree Murder and Discharging a Firearm During and in Relation to a Crime of Violence. ECF 153. This was the culmination of a trial that began June 7, 2021. During the trial, on the morning and afternoon of June 9th, defense counsel Robin Emmans was cross-examining SA Clinton Barefoot. It was during the afternoon section of cross examination that SA Barefoot uttered his opinion on Mr. Stevens' guilt and asserted that Mr. Stevens had killed witnesses, which Ms. Emmans did not hear, but Mr. Klein objected to. ECF 165, p. 226-227, ll. 21-25, 1-4. Examination continued after the objection. Ultimately, the court called a recess for the day early, likely in response to Ms. Emmans getting bogged down in notes and unable to find a notepad. ECF 165, p. 234, ll. 1-11. The following day, the defense filed a motion for either mistrial or a corrective instruction regarding SA Barefoot's opinion statement, ultimately withdrawing the mistrial request and maintaining the request for a corrective instruction. ECF 166, p. 4-5, ll. 15-25, 1-8. Also, due to COVID-related protocols, Ms. Emmans notified the court that she had been unwell, but did not have a fever and did not believe there was any risk of COVID infection or exposure. ECF 166, p. 4, ll. 4-14. Witness examinations continued thereafter. The transcript of both days has been filed, with cross examination of SA Barefoot at ECF 165, pp. 70-114, 200-234, and ECF 166, pp. 14-53, pp. 63-66.

1 In mid-July, Ms. Emmans discovered that she had mixed up medication for
2 depression and anxiety with a blood pressure medication. Based upon pill counts, the
3 mix-up would have occurred about a week before Mr. Stevens' trial began. On
4 August 11, Ms. Emmans was able to meet with her prescribing ARNP, who
5 confirmed that during the trial, medication levels for the anti-depressant were fading,
6 and she was taking an unneeded blood pressure medication, with effects as described
7 in the attached declarations. The ARNP also confirmed that Ms. Emmans' symptoms
8 in court and after court on June 9th were consistent with a panic attack.
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13 Applicable Law

14 Every defendant has the right to the effective assistance of counsel, under the
15 6th Amendment to the United States Constitution. This motion is raised at an unusual
16 procedural stage, in the time between conviction and sentencing, based upon
17 information affecting the fitness of counsel during trial, which was not discovered
18 until more than 14 days after the verdict. For this reason, the motion for a new trial
19 presents as the appropriate mechanism for raising the issue, rather than an appeal or
20 later collateral attack. Because this issue fits best as an ineffective assistance of
21 counsel claim, it will be analyzed here under the Strickland standard. Dows v. Wood,
22 211 F.3d 480, 482 (9th Cir. 2000) ("Ineffective assistance of counsel claims are
23 analyzed under the Strickland framework, which is considered to be clearly
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1 established federal law, as determined by the Supreme Court of the United States for
2 purposes of 28 U.S.C.S. § 2254(d) review”). The Strickland framework is as follows:

3 Under Strickland, we evaluate (1) whether counsel's conduct was deficient -
4 i.e., seen objectively, was out of "the wide range of professionally competent
5 assistance" and, if so, (2) whether it was prejudicial to the defendant - i.e.,
6 was there a "reasonable probability that, but for counsel's unprofessional
7 errors, the result of the proceeding would have been different." Strickland,
8 466 U.S. at 691, 694; see also Smith v. Robbins, 528 U.S. 259, 145 L. Ed.
9 2d 756, 120 S. Ct. 746, 764 (1999). "A reasonable probability is a probability
sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at
694.

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11 Dows v. Wood, 211 F.3d 480, 484-85 (9th Cir. 2000). A mental disease or defect is
12 not cause for a finding that counsel's performance was per se ineffective. *Id.*, at 485.
13 However, defense counsel must be able to "subject the prosecution's case to
14 meaningful adversarial testing." Dows v. Wood, 211 F.3d 480, 485 (9th Cir. 2000). In
15 other settings, it has been remarked by the United States Supreme Court that "[c]ross-
16 examination is the principal means by which the believability of a witness and the
17 truth of his testimony are tested," Davis v. Alaska, 415 U.S. 308, 316 (1974), and that
18 denial of the right of effective cross-examination is "constitutional error of the first
19 magnitude and no amount of showing of want of prejudice would cure it." *Id.*, at 318.
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23 24 Argument

25 During day 3 of Jordan Stevens' trial, Ms. Emmans handled cross examination
26 of SA Clint Barefoot and of the pathologist. Agent Barefoot's testimony was divided
27 into morning and afternoon sessions in order to accommodate other witnesses' travel
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1 arrangements. During the afternoon session, Ms. Emmans became confused, lost the
2 thread of the cross examination at times, and ultimately was staring at notes blankly
3 when the court finally called an early recess for the afternoon. During that time, the
4 witness expressed his opinion that Jordan Stevens was guilty of the crime charged
5 and went on to assert that Mr. Stevens had killed witnesses. Mr. Klein objected, as
6 Ms. Emmans did not hear the statement. In a murder trial, during the cross
7 examination of the government's lead investigator, a lapse of concentration and focus
8 by the examining attorney presents a serious risk to the fairness of proceedings. It is
9 an essential part of "subject[ing] the prosecution's case to meaningful adversarial
10 testing." Indeed, in Mr. Stevens' case, Ms. Emmans' lapse led to statements by the
11 witness that on their own could have been cause for mistrial. The defense at that time
12 decided to maintain a request for a curative instruction rather than a motion for
13 mistrial, but that decision was made without knowledge of Ms. Emmans' impairment.
14 Taken as a whole, the testimony of Agent Barefoot on cross examination likely had a
15 significant, prejudicial effect on the jury's decision to convict Mr. Stevens.
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22 CONCLUSION

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24 For the above reasons, Defendant respectfully requests that this court grant him
25 a new trial in the above-captioned matter, as to Counts 3 and 4.
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1 Respectfully submitted October 5, 2021

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CERTIFICATE OF SERVICE

11 I hereby certify that on October 5, 2021, I electronically filed the foregoing
12 with the Clerk of the Court using the CM/ECF System which will send notifications
13 of such filing to AUSA Benjamin Seal and AUSA Richard Burson.
14

15 s/ Robin C. Emmans
16 Robin C. Emmans, WSBA 37085